Supreme Court, U.S.
FILED
991480 MAR - 7 2000
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No. ____

IN THE
SUPREME COURT OF THE UNITED STATES

MRO COMMUNICATIONS, INC.,
a Nevada Corporation,
Petitioner,

v.

AMERICAN TELEPHONE &
TELEGRAPH COMPANY, now AT&T Corp.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does tying by the dominant carrier of its common carrier transport services tariffed under 47 U.S.C. Section 203, to its non-tariffed services, while at the same time tying those non-tariffed services back to its tariffed services violate the antitrust laws, 15 U.S.C. Sections 1 and 2?

PARTIES TO THE PROCEEDING

Petitioner

The parent company of Petitioner MRO Communications, Inc. ("MRO") is Bellatrix International, Inc., a corporation which has shares issued to the public.

Respondent

The respondent is AT&T Corporation.

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Wright and Miller, Federal Practice and Procedure 2nd,
Section 1368, p. 520 5

Petitioner MRO Communications, Inc. respectfully requests that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals in this case.

OPINIONS BELOW

The Memorandum opinion of the United States Court of Appeals for the Ninth Circuit is officially unreported; however, it is published in full on the Internet by both LEXIS®- NEXIS® and WESTLAW. A copy is included as Appendix ("App.") A at la. The Report and Recommendation of United States Magistrate Judge (Defendant's Motion for Judgment on the Pleadings) is included as App. C at 22a. The Order of the United States District Court for the District of Nevada affirming said Report and Recommendation is included as App. B at 20a.

JURISDICTION

The United States Court of Appeals issued its Memorandum opinion on December 13, 1999. On December 27, 1999 Petitioner filed a Petition for Rehearing and Petition for Rehearing En Banc, which the United States Court of Appeals denied on January 25, 2000 (App. D at 33a). This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. The Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

15 U.S.C. Section 1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. Section 2

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

47 U.S.C. Section 151

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make it available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, nation-wide, and world-wide wire and radio communication service

with adequate facilities at reasonable charges...

47 U.S.C. Section 201(a)

It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefore...

47 U.S.C. Section 201(b)

All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful...

47 U.S.C. Section 202(a)

It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

47 U.S.C. Section 203(a)

Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own

system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges ....

47 U.S.C. Section 203(c)

No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule...

STATEMENT OF THE CASE

A. Factual Background.

The heart of this case is AT&T's tying of its non-tariffed billing and collection services to its tariffed transport services and, that being accomplished, tying such tariffed services to its non-tariffed services. Briefly the facts are as follows:

Because the appeal is from a judgment on the pleadings dismissing the complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), the facts as averred in MRO's First Amended and Supplemental Complaint (App. E at 35a-51a). ("FASC') are assumed to be true. Wright and Miller, Federal Practice and Procedure 2nd, Section 1368, p. 520.

MRO Communications, Inc. ("MRO"), a Nevada corporation, operates as a service bureau for businesses that provide information and entertainment through pay-per-call programs.

On May 2, 1989, MRO entered into a written contract, known as a Billing Services Agreement ("BSA") with AT&T Communications, Inc., now known as AT&T Corp., whereby AT&T agrees under its BSA (1) to provide 900 telephone number billing and collection services for MRO, (2) to handle certain billing complaints or inquiries from 900 callers, and (3) under its tariff, to provide 900 network or transport services pursuant to the Federal Communications Act ("FCA") to transport calls from callers' phones to the 900 numbers at MRO's facility in Las Vegas. Under the BSA, AT&T receives 10% of the price of each MRO 900 call as compensation for providing billing services. In addition, under AT&T's tariff, AT&T received certain charges for transporting the calls from the callers' phones to the 900 numbers at MRO's facility. MRO's BSA is a printed form used extensively by AT&T in the industry (App. E, par. 24 at 44a).

AT&T's BSA's first tie is a provision that AT&T will terminate non-tariffed 900 billing services if AT&T's 900 Network (tariffed transport) Services are not subscribed to for 90 days. The BSA's second tie is a provision that on

termination of the BSA by either party, with or without cause, AT&T will terminate tariffed transport services on MRO's then existing 900 numbers, by changing those 900 numbers. When AT&T changes the 900 number (which is part of their 900 tariffed service pursuant to Section 5.4.3.A. of AT&T's Tariff No.1). AT&T does not provide any referral message service to any other telephone number. Commencing in 1991, because of alleged violations of AT&T's advertising guidelines, AT&T unilaterally and without authorization[1] terminated billing and transport services on particular 900 numbers of MRO after substantial sums had been spent building each 900 number's value. As a result, MRO suffered a projected loss of its own and its IP's revenues in excess of $30 million (App. E, pars. 23-29 at 43a-46a). The Court held that such actions by AT&T do not violate Section 1 or 2 of the Sherman Act (App. A at 6a).

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[1] Paragraph 23 of MRO's Complaint (App. E at 43a) averred: "Even though Section 9 of MRO's BSA is expressly applicable only upon termination of this Agreement', AT&T applied it whenever any particular 900 program under the MRO BSA was terminated, even though the MRO BSA itself was not terminated as required by the BSA. Thus upon AT&T's termination of any program under the MRO BSA, AT&T refused to permit MRO to keep the same 900 telephone number(s) in order for MRO to continue to receive tariffed transport services on such 900 telephone number(s). AT&T refused to continue to provide tariffed transport services for MRO after AT&T's billing services for a particular MRO 900 telephone was terminated, unless AT&T assigned a new 900 telephone number. Since the callers of such 900 telephone numbers were used to calling the existing MRO 900 telephone numbers, this AT&T practice destroyed the value of MRO's and the IP's interest in such 900 telephone numbers."

MRO also averred (App. E, par. 29 at 46a) that since 1989, AT&T's share of both the national tariffed transport services market and the national billing and collection services market for national 900 telephone numbers has approximated fifty percent (50%) of such markets; and that such markets total an estimated $1.0 billion dollars annually. MRO's revenue from AT&T 900 telephone numbers and from servicing such 900 numbers exceeded one million dollars per month before AT&T commenced illegally terminating billing and collection services and tariffed transport services on MRO's 900 telephone numbers, as well as the 900 telephone numbers themselves. But for AT&T ties, charges for 900 tariffed and/or billing services would have been reduced by at least 10% to MRO (App. E, pars. 27, 29, 30 at 45a-46a).

Paragraph 30 of MRO's FASC averred that nothing in AT&T's 900 tariff permits AT&T to terminate tariffed transport services for particular 900 numbers because of AT&T's customers' alleged or actual violations of the BSA, or AT&T advertising or other AT&T Guidelines[2] (App. E, par. 30 at 46a).

The express tying provisions of AT&T's BSA are (App. E, par. 22 at 43a):

> "8.G. The Premium Billing Arrangement for MultiQuest Dial-It 900 Service provided for in this agreement will automatically terminate if Network [tariffed transport] Services are not subscribed to for a period of ninety (90) days.

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[2] Cf. Sections 5.4.1. and 5.4.3.C. of AT&T's Tariff No. 1 which permit termination of AT&T's 900 numbers for other reasons.

9 .... upon termination of this [non-tariffed] *Agreement AT&T will assign you a different* telephone number(s) if you elect to continue Network Services. [i.e., tariffed transport services]." [3]

MRO's FASC states the anticompetitive effects of those AT&T tying provisions as follows (App.E at 44a):

"24. As a result of these provisions (and virtually identical provisions in all of AT&T's other BSA's with other customers) all of AT&T's 900 MultiQuest BSA customers must use AT&T's tariffed transport services (i.e., "Utility" or "Network Services"); then if the BSA is terminated by either party, for any reason whatsoever, AT&T's 900 customer loses its unique 900 numbers. The practical effects on information providers are very severe. After operations commence, the AT&T 900 information provider like MRO, cannot elect to use another billing service without losing its 900 telephone numbers, in which it has invested significant monies in promotion, and which are typically the only practical way for the 900 information provider's customers to do business with the information provider, or to even be able to contact the information provider.

25. Thus, under paragraph 8.G. of the MRO BSA, the 900 information provider must

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[3] See footnote 1.

use AT&T's Network [tariffed transport or utility] services. If an information provider, like MRO, uses AT&T's tariffed 900 transport services, the information provider must continue to use AT&T billing services or lose its unique 900 numbers; in which the customer, such as MRO, typically will have invested substantial sums. The effects of these provisions in the MRO BSA are to "tie" AT&T's tariffed 900 transport services to its 900 billing services for the information provider's life, and to prevent AT&T customers (like MRO) from utilizing billing services of AT&T's competitors."

B. The Proceedings Below.

On May 31, 1995, MRO's First Amended and Supplemental Complaint ("FASC") for inter alia violation of the antitrust laws was filed (App. E at 35a). The Report and Recommendation of the United States Magistrate Judge granting AT&T' s Motion for Judgment on the Pleadings dismissing MRO's antitrust claims was filed on June 17, 1996 (App. C at 22a). On July 10, 1996 the Report was affirmed by the District Judge (App. B at 20a). The Order and Amended Judgment dismissing MRO's antitrust and other claims was entered on July 30, 1998. MRO's Notice of Appeal was filed on August 27, 1998. The Memorandum opinion of the United States Court of Appeals for the Ninth Circuit affirming the judgment of the District Court was filed on December 13, 1999 (App. A at la) and MRO's Petition for Rehearing and Rehearing En Banc was denied January 25, 2000 (App. D at 33a).

The District Court had jurisdiction over the antitrust claims under 15 U.S.C. Section 15(a). Jurisdiction in the Court of Appeals was under Fed. R.Civ.P. 54(b) and 28 U.S.C. Section 1291.

Citing no decisions of this Court, the Court of Appeals found MRO's averment of AT&T's 50% dominant market share[4] insufficient to allow MRO to prove AT&T's market

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[4] Although MRO pled monopoly power in its FASC, 100%, by AT&T in the after market of AT&T's own tariffed 900 services for AT&T's 900 billing services customers, as well as 50% market power in the primary market of 900 billing services, the Ninth Circuit dealt only with the primary market. It relied on Mozart Co. v. Mercedes - Benz of North America, Inc., 833 F.2d 1342 (9th Cir. 1987), cert. denied 488 U.S. 870 (1988), quoting the following:

> "Obviously there are costs to surrendering one franchise and acquiring another, but these costs are unrelated to the 'market power' of the [franchisor's product]. These costs will enable the [franchisor] to extract concessions from the [franchisee], but this power is related to the franchise method of doing business, not to the possible uniqueness of the [product]. 833 F.2d 1346-47."

This quotation from Mozart was expressly not the reason for that decision, 833 F.2d 1347; also Mozart involved an appeal from a jury verdict, not a dismissal under Fed. R.Civ.P. 12(b)(6).

But even if the quotation from Mozart were the law generally, that the market for automobile parts was part of the larger market for franchises, such principle does not apply here. AT&T's tariffed 900 transport services market could not be combined with its 900 billing services market because the latter is

power under Sections 1 and 2 of the Sherman Act; cf. Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 464 (1992). The Court of Appeals "found" no intent to monopolize, control prices or destroy competition (App. A at 5a-6a), even though MRO specifically averred that AT&T's practices are of "no useful benefit to AT&T other than to exact a penalty" from customers (App. E, par 26 at 45a), that because of restrictions on portability there are barriers to entry, and that the effect of AT&T's practices is to increase costs by at least 10% (App. E, par. 27 at 45a-46a). More important, the Court of Appeals rejected MRO's tying arguments under Section One of the Sherman Act by relying on cases holding that the tied and tying products constituted one market (App. A at 6a). MRO submits that it necessarily defeats the purpose of the provisions of the Federal Communications Act to liken the relationship between tariffed and non-tariffed communications services to the automobile franchise business, as did the Court of Appeals (App. A at 6a-7a).[5]

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not tariffed.

[5] For example, in In the Matter of Competition in the Interstate Interexchange Marketplace, FCC Docket No. 90-132, the FCC stated:

> "We conclude, first, that until 800 number portability is available, future bundling by AT&T of any service with 800 or inbound service using 'old' 800 numbers (800 numbers that were in use by the customer on the day prior to the release of this order) is an unlawful practice under Section 201(b) of the Communications Act." 7 FCC Rcd. No.9, p. 2677.

In this case there is no difficulty in finding two distinct products, i.e. collateral contract services on the one hand, tariffed services on the other; one is not tariffed; one is; one is not under the jurisdiction of the FCC; one is; cf. Eastman Kodak, 504 U.S. 462. The tariffed product must be offered to everyone; the collateral contract service is offered according to AT&T's discretion.

Apparently, even the dissenting opinion in Eastman Kodak would find liability against AT&T because, in contrast to Eastman Kodak, in this case AT&T is averred to have dominant 50% market power in the primary interbrand market (non-tariffed 900 billing and collection services); cf. Eastman Kodak, 504 U.S. 486, 503-04. As to the secondary market, it is abundantly clear that AT&T controls 100% of the tariffed

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The Commission's rationale was that:

> "Because of concerns that bundling of 800 services by AT&T could lead to anticompetitive leveraging, thereby harming competition for other services, we prohibited AT&T from including 800 or inbound services in contract-based tariffs or Tariff 12 integrated services packages until 800 numbers become portable." 7 FCC Rcd. No. 9, p. 2678.

More specifically, the Commission concluded:

> "We have found that leveraging is a significant risk with respect to 'captive' 800 service customers - customers that are unable to change their 800 number without incurring substantial costs." 7 FCC Rcd. No. 9, p. 2680.

transport service market for its 900 billing and collection customers. As averred in MRO's complaint, once a customer signs up for AT&T's tariffed 900 transport service and AT&T's non-tariffed 900 billing and collection services, the customer cannot seek a cheaper competitor for its non-tariffed billing and collection services without losing its unique and very valuable 900 telephone number (App. E, pars. 23-26 at 43a-45a). The particular telephone numbers are the most valuable part of MRO's, and other AT&T 900 customers' business, Ibid. Thus, AT&T's 900 tariffed transport services for its 900 billing service customers are not interchangeable with those of its competitors. AT&T's customers for its tied 900 non-tariffed and tariffed services should be able to terminate AT&T's non-tariffed 900 billing and collection services, and have AT&T's competitors provide those non-tariffed services on their 900 numbers serviced by AT&T's tariffed transport services.

Although the Magistrate Judge's opinion in the District Court appeared to apply a "Rule of Reason" test (App. C at 24a), the Court of Appeals' Memorandum opinion did not directly deal with the difference between per se and "Rule of Reason" tying, but did require a showing of per se market power (App. A at 5a). This requirement is contrary to the Third Circuit's application of "Rule of Reason" tying; Town Sound and Custom Tops v. Chrysler Motors, 959 F.2d 468, 482 et seq. (3rd Cir. 1992). In Town Sound Judge Becker analyzes Jefferson Parish Hospital Dist No. 2 v. Hyde, 466 U.S. 2 (1984) to mean that it is not necessary to make the same showing of tying market power in a "Rule of Reason" case that is a prerequisite to a per se tying claim, 959 F.2d 483. Accord: Grappone, Inc. v. Subaru of New England Inc., 858 F.2d 792 (1st Cir. 1988). The Ninth Circuit refused to consider the "Rule of Reason' alternative, even though MRO averred that AT&T's practices were of no useful benefit to

AT&T except to injure competition (App. E, pars. 26-27, at 45a-46a).

The Memorandum opinion places controlling reliance on the existence of two, less than dominant competitors, MCI and Sprint, to find no antitrust violations and particularly no market power by AT&T under either Section One or Two of the Sherman Act (App. A at 5a-6a). MRO averred that it rejected MCI and Sprint because their service was inferior (App. E, pars. 13, 18 at 39a, 41a).[6] But the existence of competitors offering even identical products is no defense to tying. Northern Pacific Railway v. United States, 356 U.S. 1, 10, n. 8 (1958).

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[6] The Ninth Circuit's Memorandum (App. A at 5a-6a) relies upon cases "rejecting the theory that a good reputation for providing high quality service, without more, confers market power." But MRO pled much more. MRO's FASC pled that AT&T not only had approximately 50% of both markets (App. E, par. 29 at 46a) but that AT&T represented to MRO that AT&T's rate of uncollectibles and chargebacks was lower than that of MCI and Sprint, and that AT&T had more accurate, effective and efficient billing and collection services (App. E, pars. 13, 18 at 39a, 41a). These are allegations of fact, not allegations of reputation. MRO's FASC also averred AT&T's insertion of very onerous tying conditions in its BSA, which would not have survived in a competitive market (App. F, pars. 22-24 at 43a-44a); See also the Ninth Circuit's reference in their Memorandum (App. A at 9a-10a) to AT&T's damage disclaimer.

REASONS FOR GRANTING WRIT

I. IT IS IMPORTANT TO THE GROWING TELECOMMUNICATIONS INDUSTRY THAT THIS COURT DECIDE THAT UNDER THE ANTITRUST LAWS TARIFFED SERVICES CAN NOT BE TIED TO NON-TARIFFED SERVICES.

AT&T's two ties defeat Congress's attempts to deregulate and promote competition in tariffed services. AT&T's first BSA tie requiring customers of its 900 non-tariffed billing services to use AT&T's tariffed transport services obviously gives AT&T an illegal leg up in tariffed transport services over its competitors who provide only tariffed transport services. Even universal portability of telephone numbers among carriers would not prevent this abuse.

Tariffed services must be "just and reasonable", 47 U.S.C. Section 201 (b), and offered without "unjust or unreasonable discrimination", 47 U.S.C. Section 202(a). These requirements apply to common carrier lines of communication *** derived from wire ****. See 47 U.S.C. Section 160(a). Interstate communication by wire is regulated by the Federal Communication Commission ("FCC"), 47 U.S.C. Section 151. By tying, a company, such as AT&T, subject to the Federal Communications Act ("FCA") and the Telecommunications Act of 1996 may be able to avoid their provisions and the jurisdiction of the FCC.[7] Thus, whenever

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[7] Counsel for Petitioner is one of the attorneys in an injunctive action before the FCC on behalf of a national trade association, Teleservices Industry Association v. AT&T, File No. E-97-25, which also seeks relief declaring that such AT&T ties

AT&T's non-tariffed 900 billing services are terminated by AT&T, or by a subscriber (who is tied by the BSA to subscribe to AT&T's tariffed transport services), AT&T changes the subscriber's telephone number. This is done pursuant to a BSA provision, which is not in the tariff (App. E, pars. 23-26 at 43a-45a). Thus, pursuant to the Ninth Circuit's decision, AT&T may be able to avoid the "just and reasonable" requirements of 47 U.S.C. Section 201 (b). The Court of Appeals ruled (and according to it, the FCC has also ruled) that the contract by which AT&T perpetrates this practice is not subject to the Federal Communications Act (App.A at 17a-18a).[8] By recognizing tariffed services as a

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violate the FCA.

[8] Specifically, the Ninth Circuit stated:

> "The district court's conclusion was supported by an FCC opinion relating to the same issue. See In re AT&T 900 Dial-It Servs. and Third Party Billing and Collection Servs, 4 FCC Rec. 3429 (1989). In the opinion, the FCC decided that AT&T's billing services were properly offered by AT&T on a non-tariffed basis and that the services should not be regulated by the FCA. Id. at 3433-34. In arriving at this decision, the FCC had before it a sample AT&T billing services contract. Id. at 3435 n.53. MRO's argument is unpersuasive in the face of the FCC's opinion explicitly stating that it was 'not convinced that any connection between the [billing services and transport services] is so significant to warrant regulation of the billing services pursuant to the FCA.' Id. at 3433."

The Ninth Circuit's above finding of fact concerning the

distinct market, this Court can curtail this and similar practices.

It was important for the Court to determine in Eastman Kodak v. Image Technical Services, 504 U.S. 451 (1992), whether there could be market power in a common commercial aftermarket; there would seem to be even a stronger reason to find such a market in tariffed services, an essential part of the telecommunications industry. We have been unable to find a reported appellate decision on this point, although the opinion in this case is fully reported on the Internet by both LEXIS®-NEXIS® and by WEST LAW, 1999 WL 1178964, 2000-1 Trade Cases, P. 72,751.

AT&T billing services contract is incorrect. For example, while the Ninth Circuit's Memorandum referred to footnote 53 in Dial-It, the very next sentence at 3432 covered by Dial-It footnote 54 states in relevant part:

> "AT&T asserts that sponsor/subscribers are not required to take Premium Billing as a concomitant to tariffed Dial-It 900 services and indeed, tariffed service subscribers are not 'entitled' to receive Premium Billing Service. 54"

Thus, in Dial-It, because there was no tie between 900 billing services and 900 tariffed transport services, the FCC concluded that there was no significant connection between AT&T's 900 billing and 900 transport services. However, in this case it is undisputed that Sections 8.G and 9 of AT&T's BSA ties AT&T's nontariffed 900 billing and collection services to AT&T's 900 tariffed transport services, and vice-versa.

II. THE COURT OF APPEALS DECIDED IMPORTANT QUESTIONS OF ANTITRUST LAW CONTRARY TO EAST MAN KODAK v. IMAGE TECHNICAL SERVICES, 504 U.S. 451 (1992), AND DECISIONS OF THE COURTS OF APPEALS OF THE FIRST AND THIRD CIRCUITS.

The Memorandum opinion of the Court of Appeals fails to follow Eastman Kodak v. Image Technical Services, supra, in the following respects:

First, MRO's averment of AT&T's dominant power in the separate market for non-tariffed billing services is sufficient. 504 U.S. 462; (App. E, pars. 27-29 at 45a-46a).

Second, MRO's averment of AT&T's dominant 50% market share in the national 900 billing service market is sufficient to permit MRO to prove AT&T's market power for purposes of Sections 1 and 2 of the Sherman Act. 504 U.S. 464; (App. E, pars. 24, 25, 27, 29 at 44a-46a).

Third, MRO's averment that after contracting with AT&T, a 900 billing services customer is unable to change to a different non-tariffed billing services provider (i.e., a third party billing and collection company) without losing its valuable telephone numbers means that AT&T has 100% of the market of all its 900 billing and collection customers for 900 tariffed transport services (App. E, pars. 23-30 at 43a-46a). This is sufficient to establish AT&T's market power for a Section Two violation of the Sherman Act, 15 U.S.C. Section 2. 504 U.S. 481.

As previously stated, the two ties involved in this case are express ties: one tying non-tariffed 900 billing and collection services to tariffed transport services, and another tying those tariffed transport services to AT&T's non-tariffed billing and collection services (App. E, par. 22 at 43a). The Ninth Circuit's decision (by requiring a showing of per se market power and by failing to recognize ties which violate the "Rule of Reason") is also contrary to the decisions of the First and Third Circuits in Town Sound, supra, and Grappone, supra.

CONCLUSION

The Petition for a Writ of Certiorari should be granted in order to prevent restrictive practices in the telecommunications industry, subversion of the Federal Communications Act, and inconsistent decisions between the Circuit Courts of Appeals, and this Court.

Dated: March 6, 2000.

Respectfully submitted,

/s/_____

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed December 13, 1999]

No. 98-16716
D.C. No. CV-95-00503-PMP

MRO COMMUNICATIONS, INC.,
Plaintiff-Appellant,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY, now AT&T Corp.,
Defendant-Appellee.

MEMORANDUM[1]

[1] This disposition is not appropriate for publication and may not be cited to or by courts of this circuit except as may be provided by 9th Cir.R. 36-3.

Court of Appeals Memorandum - 12/13/99

Appeal from the United States District Court
for the District of Nevada
Philip M, Pro, District Judge, Presiding

Argued and Submitted November 2, 1999
San Francisco, California

Before: CHOY, SCHROEDER, and ALARCÓN, Circuit Judges.

MRO Communications, Inc. ("MRO"), appeals from the order granting judgment on the pleadings to American Telephone & Telegraph Company ("AT&T") on MRO's antitrust claims, the order of partial summary judgment in favor of AT&T on a number of other issues and claims, and the grant of judgment as a matter of law for AT&T on MRO's remaining claims after a jury trial. Because MRO failed to present facts sufficient to support any of its claims, we affirm. Because the parties are familiar with historical and procedural background of this dispute, we will not rehearse them here.

I

MRO contends that the allegations in its complaint were sufficient to withstand AT&T's motion for judgment on the pleadings on MRO's claims under 15 U.S.C. §§ 1 and 2. We review de novo the entry of a judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). Arnett v. California Pub. Employees Retirement Sys., 179 F.3d 690, 694 (9th Cir. 1999). Judgment for AT&T was properly granted because, taking all the allegations in the pleadings as true, AT&T was entitled to judgment as a matter of law. See

Nelson v. City of Irvine, 143 F.3d 1196, 1200 (9th Cir.), cert. denied, ___ U.S ___ 119 S. Ct. 444 (1998).

A

To make out a claim of monopolization in violation of 15 U.S.C. § 2, MRO had to allege: (1) AT&T's possession of monopoly power in the relevant market; (2) AT&T's willful acquisition or maintenance of that power through exclusionary conduct; and (3) causal antitrust injury. American Prof'l Testing Serv. Inc. v. Harcourt Brace Jovanovich Legal and Prof'l Publications, Inc., 108 F.3d 1147, 1115 (9th Cir. 1997).

The one fact that MRO averred to support a finding of monopoly power was that AT&T had approximately a 50% share of the billing services and transport services markets. A high market share may raise an inference of monopoly power, Oahu Gas Serv., Inc. v. Pacific Resources, Inc., 838 F.2d 360, 366 (9th Cir. 1988). It is unlikely, however, that a 50% share of market, without more, can support a finding of monopoly power. See Rebel Oil Co., Inc. v. Atlantic Richfield Co., 51 F.3d 1421, 1438 (9th Cir. 1995) ("[N]umerous cases hold that a market share of less than 50 percent is presumptively insufficient to establish market power. . . . [A.] market share of 44 percent is sufficient as a matter of law to support a finding of market power, if entry barriers are high and competitors are unable to expand their output in response to supracompetitive pricing."); Twin City Sportserv, Inc. v. Charles O. Finley & Co., 512 F.2d 1264, 1274 (9th Cir. 1975) "[O]n several occasions courts have considered a 50% share of the market as inadequate to establish a proscribed monopoly.").

More importantly, an inference of monopoly power from a high market share is inappropriate where there is evidence of the defendant's inability to control prices or exclude competitors. Oahu Gas, 838 F.2d at 366. MRO's concession in its complaint that both MCI and Sprint offered billing and transport services and submitted viable bids to MRO is compelling evidence of AT&T's inability to exclude competitors. MRO failed to allege facts demonstrating that AT&T possessed monopoly power as required to sustain a claim of monopolization under 15 U.S.C. § 2.

B

To make out a claim of attempted monopolization in violation of 15 U.S.C. § 2, MRO had to allege: (1) AT&T's specific intent to control prices or destroy competition; (2) predatory or anti-competitive conduct directed at accomplishing that propose; (3) a dangerous probability of AT&T achieving monopoly power; and (4) causal antitrust injury. Rebel Oil Co., 51 F.3d at 1432-33.

Neither monopoly power nor a dangerous probability of achieving monopoly power can exist absent barriers to new entry or expansion. American Prof'l Testing, 108 F.3d at 1154; Rebel Oil, 51 F.3d at 1439. The main sources of entry barriers are: (1) legal license requirements; (2) control of an essential or superior resource; (3) entrenched buyer preference for established brands; (4) capital market evaluations imposing higher capital costs on new entrants; and, in some situations, (5) economies of scale. American Prof'l Testing, 108 F.3d at 1154. We have rejected the theory that the good reputation of one vendor for providing

high quality service constitutes an entry barrier to other vendors. Id.

In its complaint, MRO did not allege any barriers to entry or expansion in the billing or transport services markets. Furthermore, MRO did not allege that AT&T had a specific intent to control prices or destroy competition and that AT&T engaged in predatory or anti-competitive conduct directed at accomplishing that purpose. MRO alleged only that the BSA provisions had the "effect" of preventing AT&T customers from switching to a new billing services provider. The facts alleged do not support MRO's attempted monopolization claim.

C

To make out a claim of tying in violation of 15 U.S.C. § 1, MRO had to allege: (1) a tie-in between two products or services sold in different markets; (2) market power in the tying product market; and (3) an effect on a not insubstantial volume of commerce. Datagate, Inc. v. Hewlett-Packard Co., 60 F.3d 1421, 1423-24 (9th Cir. 1995). To plead the element of market power, MRO had to allege that AT&T had sufficient economic power in one product market to "coerce" MRO to purchase a second product. Id. at 1426.

By its own account, MRO could have contracted with either MCI or Sprint for billing and transport services but chose to contract with AT&T. MRO's allegation that it chose to contract with AT&T because it believed AT&T would deliver better service is not enough to support an inference of market power. See American Prof'l Testing, 108 F.3d at 1154 (rejecting the theory that a good reputation for

providing high quality service, without more, confers market power) (citing United States v. Syufy Enters, 903 F.2d 659, 668-69 (9th Cir. 1990)).

MRO contends that AT&T's practice of assigning new 900 numbers to existing customers was a form of unlawful tying. As alleged in MRO's complaint, AT&T was able to discourage billing and transport customers from switching to a new billing services provider because of the equity the customers develop in their specific 900 numbers. We have already considered and rejected the theory that a practice like AT&T's is an exploitation of market power.

In Mozart Co. v. Mercedes-Benz of North America, Inc., a Mercedes-Benz franchisee was obligated under the franchise contract to use only parts approved by the franchisor. 833 F.2d 1342, 1343-44 (9th Cir. 1987). The crux of the franchisee's tying claim was that he had to buy the parts the franchisor required or else he would lose the investment he had made in his franchise. Id. at 1346. We rejected the theory that the franchisor's policy was unlawful tying:

> Obviously there are costs to surrendering one franchise and acquiring another, but these costs are unrelated to the "market power" of the [franchisor's product]. These costs will enable the [franchisor] to extract concessions from the [franchisee], but this power is related to the franchise method of doing business, not to the possible uniqueness of the [product].

Id. at 1346-47.

As in Mozart, the advantage AT&T acquires over its 900 number customers is unrelated to market power and instead arises out of the nature of the business relationship. A service provider with a tiny share of the billing and transport services markets would acquire this same advantage over its customers. The district court did not err in denying MRO's tying claim.

D

MRO asserts that the district court should have granted MRO leave to amend instead of entering judgment on the pleadings for AT&T. We review the denial of leave to amend for abuse of discretion. Swanson v. United States Forest Serv., 87 F.3d 339, 343 (9th Cir. 1996). Because MRO failed to move properly for leave to amend, the district court's failure to grant such leave was not an abuse of discretion.

Under the Local Rules of Practice for the District of Nevada, "[t]he original proposed amended pleading shall be signed and attached to any motion to amend a pleading." D. Nev. R. 15-1(a). MRO's "motion" for leave to amend consisted of requests made in its opposition to AT&T's motion for judgment on the pleadings and in MRO's filed objections to the magistrate judge's report to the district court. MRO did not submit a proposed amended pleading to the court.

Valid local rules have the force of law. Marshall v. Gates, 44 F.3d 722, 724 (9th Cir. 1995). A local rule is valid if it is "not inconsistent" with the Federal Rules of Civil Procedure. Id. (citing Fed. R. Civ. P. 83). The pertinent Federal Rule provides that, after a responsive pleading has

been served, a party may amend its pleading by "leave of court." Fed. R. Civ. P. 15(a). Nevada's Local Rule 15-1(a) merely prescribes the procedure by which a party can secure the requisite leave of court and therefore is "not inconsistent" with Rule 15(a). Because MRO did not present a proper motion for leave to amend, the district court's failure to afford such leave sua sponte was not an abuse of discretion. See Miranda v. Southern Pac. Transp. Co., 710 F.2d 516, 521 (9th Cir. 1983) ("District courts have broad discretion in interpreting and applying their local rules.").

II

A

MRO maintains that the district court erred in granting summary judgment to AT&T with respect to the enforceability of the BSA damages disclaimer and in excluding MRO's evidence of alleged "lost revenues."

1

We review a grant of summary judgment de novo. Burrell v. Star Nursery, Inc., 170 F.3d 951, 954 (9th Cir. 1999). The BSA included a New Jersey choice of law provision. New Jersey courts generally will enforce limitations of liability in private contracts like the BSA. Marbro, Inc. v. Borough of Tinton Falls, 688 A.2d 159, 162 (N.J. Super. Ct. L. Div. 1996). Under New Jersey law, MRO and AT&T could agree to limit their liability so long as the limitation was not unconscionable or otherwise in contravention of public policy. Id. As the party challenging

the contractual limitation of liability, MRO had the burden of proving its unconscionability. See id. at 163-64; see also Wasserman's Inc. v. Township of Middletown, 645 A.2d 100, 108 (N.J. 1994) (expressly holding that the party challenging a contractual liquidated damages clause has the burden of proving unreasonableness).

The reasonableness of a contractual limitation of liability is a question of law. Marbro, 688 A.2d at 164. A New Jersey court may find a limitation on liability is unconscionable if the party challenging the clause shows that it was disadvantaged in the bargaining process, was powerless to negotiate the terms of the contract, or had a justified expectation that the limitation of liability clause would not be enforced. Id. at 163. Additionally, if the party relying on the contractual limitation of liability engaged in "willful and wanton misconduct," it cannot use the contractual provision to shield itself. Tessler and Son, Inc. v. Sonitrol Sec. Sys., Inc., 497 A.2d 530, 533 (N.J. Super. Ct. App. Div. 1985). "Willful and wanton misconduct" is a tortious act performed intentionally or with reckless disregard of the consequences. Id.

In opposition to the motion for summary judgment, MRO submitted three declarations. The declaration of Michael Olsen is the only one of the three that contains allegations pertinent to the enforceability of the disclaimer. Olsen alleged that the BSA was a "take it or leave it" form contract drafted by AT&T and that MRO was less than a year old and had less than $100,000 in assets when it signed the BSA. These allegations are not enough to make the contractual limitation of liability unenforceable. Without more, the mere fact that the BSA was a "take it or leave it"

form contract does not make it unconscionable. Rudbart v. North Jersey Dist. Water Supply Comm'n, 605 A.2d 681, 687 (N.J. 1992). Moreover, the fact that MRO was a start-up company at the time of entering into the BSA does not equate to being powerless or disadvantaged in the bargaining process. See, e.g. Shell Oil Co. v. Marinello, 307 A.2d 598, 601 (N.J. 1973) (finding buyer was disadvantaged because the seller "[f]or all practical purposes [could] dictate its own terms"); Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 95 (N.J. 1960) (finding buyer was disadvantaged in the bargaining process because it had "no real freedom of choice"). Indeed, any assertion that MRO was powerless in the bargaining process is belied by MRO's concession that MCI and Sprint had also submitted bids for MRO's business.

Lastly, the alleged "willful" breaches of contact by AT&T do not rise to the level of the tort of "wanton and willful misconduct." Tessler and Sons, Inc., 497 A.2d at 533-34. A simple failure to perform under a contract is generally not a tort. See Noye v. Hoffman-La Roche Inc., 570 A.2d 12, 19 (N.J. Super. Ct. App. Div. 1990). MRO pointed to nothing that would make AT&T's conduct anything more than a simple failure to perform its contractual duties. Summary judgment was therefore properly granted on the issue of the enforceability of the contractual damages disclaimer.

2

MRO contends that the district court erred when, pursuant to the disclaimer, it excluded a damages calculation showing MRO's alleged "lost revenues" and the supporting expert testimony of David Kahn and three other experts. We

review de novo the district court's interpretation of the contractual damages disclaimer. Simula, Inc. v. Autoliv, Inc., 175 F.3d 716, 719 (9th Cir. 1999). We review the district court's exclusion of MRO's evidence for abuse of discretion. EEOC v. Pape Lift, Inc.,115 F.3d 676, 680 (9th Cir. 1997).

In Kahn's declaration, he described the methodology used in preparing the damages calculation. Kahn stated that "MRO's damage calculations reasonably estimate the incremental revenue that the MRO 900 numbers would have made, but for AT&T's improper termination of those numbers in 1991 and 1992 and other improper actions and/or inactions by AT&T as set forth in MRO's First Amended and Supplemental Complaint." He also provided a detailed description of the methodology used to calculate MRO's "lost revenues."

The damages MRO sought to prove with the excluded evidence fall squarely within the textbook definition of consequential damages. In Law of Remedies, Dan B. Dobbs describes the difference in general and consequential breach of contract damages:

> Expectancy damages are sometimes measured by "general damages" or market measures. Such measures use the market value of the very thing promised, at the time of performance, as a basis for calculation. . . . "Special damages" (consequential damages) are measured, not by the value of the promised performance alone but by the gains such performance could produce for collateral

> reasons, or the loss that is produced by the absence of such performance.

Dan B. Dobbs, Law of Remedies § 12.1(1) (2d ed. 1993); see also Perth Amboy Iron Works, Inc. v. American Home Assurance Co., 543 A.2d 1020, 1033 (N.J. Super. Ct. App. Div. 1988), aff'd mem., 571 A.2d 294 (N.J. 1990) (discussing a similar definition of consequential damages in N.J. Stat. Ann. § 12A:2-715). MRO's alleged "lost revenues" are a "loss that is produced by the absence of [AT&T's] performance." Dobbs, supra. The district court therefore did not err in concluding that MRO's "lost revenues" were consequential damages disclaimed in the BSA. The district court properly excluded the evidence as irrelevant. Fed. R. Evid. 401-402.

B

MRO also challenges the exclusion from trial of evidence of an alleged $1,476,206 in chargeback damages as a discovery sanction for untimely disclosure. MRO contends that the evidence should have been admitted as a timely supplement to an earlier expert witness disclosure. We review for abuse of discretion the district court's exclusion of evidence as a discovery sanction. Payne v. Exxon Corp., 121 F.3d 503, 507 (9th Cir. 1997).

The district court set November 29, 1995, as the date by which all of MRO's expert witness disclosures and reports required by Federal Rule of Civil Procedure 26 were to be furnished to AT&T. In the timely disclosure of David Lahaderne, he stated that he had prepared the "AT&T Chargebacks and Erroneous Chargebacks Report" ("Report").

Attached to his declaration was a thirty-page spreadsheet that was the Report and a document detailing the methodology used in its preparation. As described in that document, the Report was designed to tabulate all "duplicate" and "bogus" chargebacks. "Duplicate" chargebacks occurred when AT&T deducted the cost of the same telephone call from MRO's revenues more than once. "Bogus" chargebacks were those "chargebacks for which MRO never received payment from AT&T for the original call."

In November 1997, two years after the court's deadline, MRO furnished AT&T with an exhibit entitled "Chargebacks by Month Greater Than 90 Days From Billing Month," which purported to show $1,476,206 in chargeback damages. Lahaderne was to provide supporting expert testimony. Federal Rule of Civil Procedure 37 provides that "[a] party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) shall not, unless such failure is harmless, be permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed." Fed. R. Civ. P. 37(c)(1). It was reasonable for the district court to infer that a two year delay in disclosing evidence interfered with AT&T's ability to prepare for trial. The district court therefore did not abuse its discretion in excluding Lahaderne's additional expert testimony and the related exhibit.

MRO contends that the untimely evidence should have been admitted pursuit to Federal Rule of Civil Procedure 26(e)(1). MRO invites this court to find that Rule 26(e)(1) creates a loophole through which a party who submits partial expert witness disclosures can add to them to its advantage after the Court's deadline for doing so has passed. The

language and spirit of Rule 26(e)(1) weigh against this reading of the rule. The rule creates a "duty to supplement," not a right. Fed. R. Civ. P. 26(e)(1); see also Keener v. United States, 181 F.R.D. 639, 640 (D. Mont. 1998) ("Supplementation under the Rule means correcting inaccuracies, or filling the interstices of an incomplete report based on information that was not available at the time of the initial disclosure.").

The exhibit and additional expert testimony of Lahaderne do not correct, clarify, or fill in a gap in the original Lahaderne disclosure. Instead, the new exhibit establishes a new category of chargeback damages. MRO does not contend that the information on which the new exhibit was based was unavailable at the time of the original Lahaderne disclosure. The district court did not err in concluding that the additional evidence was not admissible under Rule 26(e)(1). See Keener, 181 F.R.D. at 641-42 (excluding, on similar facts, the untimely portion of an expert's testimony that was styled as a supplement to the original disclosure).

III

A

MRO argues that the magistrate judge erred in concluding that MRO's FCA claim did not relate back to the original complaint. We review de novo a district courts determination that a claim does not relate back. Martell v. Trilogy Ltd., 872 F.2d 322, 325 (9th Cir. 1989).

In determining whether MRO's claim under the FCA

relates back to the original complaint, the appropriate inquiry is whether the FCA claim and MRO's original complaint "'share a common core of operative facts sufficient to impart fair notice of the transaction, occurrence, or conduct called into question.'" FDIC v. Jackson, 133 F.3d 694, 702 (9th Cir. 1998) (quoting Martell, 872 F.2d at 327). In the original complaint, MRO alleged the following conduct by AT&T:

1. Failing and refusing to properly bill and collect from end users and forward those amounts to MRO.

2. Failing and refusing to credit MRO for calls for which end users never paid.

3. Failing to allow MRO to add or terminate 900 lines in order to satisfy the volume requirements under the BSA to obtain certain discounts.

4. Failing to credit MRO for MRO's monthly payments.

5. Withholding funds owed to MRO.

In the amended complaint, MRO identified the following conduct by AT&T as the basis of its FCA claim:

1. Refusing to change the termination point of MRO's transport services from Las Vegas to Reno or anywhere else in the United States.

2. Terminating transport services on MRO's particular 900 numbers, billing and collection services on MRO's 900 numbers, and terminating the 900 numbers of MRO and MRO's customers.

3. Refusing to permit other AT&T customers to terminate their 900 telephone numbers at MRO's facility.

The conduct alleged in support of the FCA claim does not overlap at all with the factual allegations in the original complaint. MRO's FCA claim and its original complaint therefore do not "share a common core of operative facts sufficient to impart fair notice [to AT&T] of the transaction, occurrence, or conduct called into question." FDIC, 133 F.3d at 702. The district court therefore properly concluded that thc FCA claim did not relate back to the original complaint. See Murray v. Laborers Union Local No. 324, 55 F.3d 1445, 1454 (9th Cir. 1995). The district court also correctly concluded that the FCA statute of limitations barred MRO's claim to the extent that it challenged conduct occurring before February 8, 1993 47 U.S.C. § 415(b).

MRO urges this court to find that MRO's FCA claim did relate back to MRO's original complaint because similar FCA claims were raised in an action against AT&T filed August 21, 1991, by a different plaintiff in a different district. Our research revealed no authority to support this position. The case MRO cited to support its position did not consider whether factual allegations in a separate action could augment the factual allegations of an original complaint for purposes of determining whether a new claim related back to the original

complaint. See Woods Exploration and Producing Co. v. Aluminum Co. of America, 438 F.2d 1286, 1299-1300 (5th Cir. 1971).

B

On appeal, MRO challenges two conclusions of law that supported the district court's entry of partial summary judgment for AT&T on the FCA claim. The district court's interpretation of the FCA is reviewed de novo. Bay Area Addiction Research and Treatment, Inc. v. City of Antioch, 179 F.3d 725, 730 (9th Cir. 1999). The district court's interpretation of the BSA is reviewed de novo. Simula, Inc. v. Autoliv, Inc., 175 F.3d 716, 719 (9th Cir. 1999).

First, MRO challenges the district court's conclusion that any alleged breaches of the BSA could not constitute violations of the FCA because the FCA does not regulate such agreements. MRO argues that AT&T's practice of assigning new 900 numbers on termination of billing services "ties" those services to the FCA regulated transport services and therefore subjects the billing services to FCA regulation. The district court's conclusion was supported by an FCC opinion relating to the same issue. See In re AT&T 900 Dial-It Servs. and Third Party Billing and Collecting Servs., 4 F.C.C.R. 3429 (1989). In the opinion, the FCC decided that AT&T's billing services were properly offered by AT&T on a non-tariffed basis and that the services should not be regulated by the FCA. Id. at 3433-34. In arriving at this decision, the FCC had before it a sample AT&T billing services contract. Id. at 3435 n.53. MRO's argument is unpersuasive in the face of the FCC's opinion explicitly stating that it was "not convinced that any connection between the [billing services

and transport services] is so significant" to warrant regulation of the billing services pursuant to the FCA. Id. at 3433. "Deference is due to the expressed opinions of the FCC on matters within their jurisdiction." California Satellite Sys. v. Seimon, 767 F.2d 1364, 1367 (9th Cir. 1985).

Second, MRO challenges the conclusion that the BSA and the Tariff expressly foreclosed any claim by MRO to a proprietary interest in its particular 900 numbers. BSA provisions 8 and 9 and Tariff provision E unambiguously establish that an AT&T customer has no proprietary right to his unique 900 numbers. A common sense reading of the BSA provisions further establishes AT&T's broad contractual right to assign new 900 numbers as AT&T sees fit to carry out its billing services or upon the termination of billing services by either party. See Klamath Water Users Protective Ass'n v. Patterson, 191 F.3d 1115, 1120 (9th Cir. 1999) (noting that a contract "is only ambiguous if reasonable people could find its terms susceptible to more than one interpretation").

A remaining question is whether Tariff provision E made AT&T's practice of assigning new 900 numbers to existing customers permissible as a matter of law under the FCA. As discussed above, however, the last time AT&T changed MRO's 900 numbers was in October 1992, more than two years before MRO filed its amended complaint. We do not reach the question of whether AT&T's practice violated the FCA because the claim is time-barred. 47 U.S.C. § 415(b).

C

MRO also contends that the district court erred in excluding the testimony of Edward Kinsley. MRO sought to introduce Kinsley's testimony in support of its FCA claim of discrimination. To sustain its discrimination claim, MRO had to establish not only that AT&T treated MRO unlike other customers but also that the differences in treatment were unjust or unreasonable. 47 U.S.C. § 202(a). The district court excluded Kinsley's testimony as irrelevant. This evidentiary ruling is reviewed for abuse of discretion. EEOC v. Pape Lift, Inc., 115 F.3d 676, 680 (9th Cir. 1997).

The reason AT&T gave when it refused to make the termination point transfer MRO had requested was that MRO was in bankruptcy and the accounts of AT&T customers in bankruptcy were "frozen." If allowed to testify, Kinsley would have testified that AT&T made just such a transfer for another customer. Kinsley and MRO conceded, however, that the other customer was not in bankruptcy. The district court may reasonably have concluded that Kinsley's testimony related only to AT&T's treatment of customers that it had a neutral, rational basis for treating differently from MRO and was therefore not probative of whether AT&T unjustly or unreasonably discriminated against MRO. The district court did not abuse its discretion in excluding Kinsley's testimony as irrelevant. Fed. R. Evid. 401-402. Because MRO offered no other evidence in support of its discrimination claim, we affirm the grant of judgment as a matter of law for AT&T on MRO's discrimination claim. Fed. R. Civ. P. 50(a).

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

[Filed July 10, 1996]

Nos. CV-S-95-503-PMP (RLH)
BK-S-92-25253-LBR
Bk. Adv. No. 932096

MRO COMMUNICATIONS, INC., etc., *Plaintiff*,	)
v.	)
AMERICAN TELEPHONE AND TELEGRAPH COMPANY, now AT&T Corp. *Defendant*.	)

ORDER

On June 17, 1996, the Honorable Roger L. Hunt entered a Report and Recommendation (#215) to grant Defendant AT&T Corp.'s Motion for Judgment on the Pleadings Dismissing Plaintiff's Antitrust Claim (#183). Objections to the Magistrate Judge's Report and Recommendation were filed in accordance with Local Rule 510-2 of the Rules of Practice of the United States District

Court for the District of Nevada by Plaintiff MRO Communications, Inc. On July 9, 1996, the Clerk of Court referred this matter to the undersigned for consideration. The Court has conducted a de novo review of the record in this case in accordance with 28 U.S.C. § 636(b) (1) (B) and (C) and Local Rule 510-2 and determines that the Reports and Recommendation of Magistrate Judge Hunt should be affirmed.

IT IS THEREFORE ORDERED that the Magistrate Judge's Report and Recommendation entered June 18, 1996, (#215) is affirmed, and Defendant AT&T Corp.'s Motion for Judgment on the Pleadings Dismissing Plaintiff's Antitrust Claim (#183) is granted.

DATED: July 9, 1996

/s/_____
PHILIP M. PRO
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

[Filed June 17, 1996]

Nos. CV-S-95-PMP-(RLH)
BK-S-92-25253-LBR
Bk. Adv. No. 932096

MRO COMMUNICATIONS, INC., a Nevada corporation, *Plaintiff*,	)
v.	)
AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et al., *Defendant*.	)

REPORT & RECOMMENDATION
OF
U.S. MAGISTRATE JUDGE

(Defendant's Motion for Judgment on the Pleadings--# 183)

Before the Court, pursuant to 28 U.S.C. § 636 (b), is Defendant AT&T Corp.'s **Motion for Judgment on the**

Pleadings Dismissing Plaintiff's Antitrust Claim (#183, filed March 12, 1996). Plaintiff MRO's Opposition to AT&T's Motion for Judgment on the Pleadings (#198) was filed on April 17, 1996. Defendant then filed its Reply Memorandtun of Points and Authorities in Support of its Motion of Judgment on the Pleadings Dismissing Plaintiff's Antitrust Claim (#208) on May 24, 1996.

FACTUAL BACKGROUND

On May 2, 1989, the Parties entered into a contractual agreement whereby Defendant would provide two types of 900 number services to Plaintiff; (1) transport services, which include the "900" telephone numbers and telephone lines over which the information or voice data is actually transmitted, and (2) billing services, by which AT&T provides the actual billing and collections from the end users of the services.

The contract provides that either party may terminate the billing services for various reasons while continuing the transport services. In such an event, however, AT&T will assign a new 900 number to the customer.

In Plaintiff's Eighteenth Claim for Relief, MRO asserts that Defendant violated Sections One and Two of the Sherman Anti-Trust Act. 15 U.S.C. §§ 1 & 2. In particular, the allegation focuses on the tie between the two services. MRO introduces a novel proposition; namely, that during the precontract stage, MRO was unable to obtain AT&T's billing services (the tying product) without also purchasing the transport services (the tied product). Then, after the contract has been consummated and considerable efforts and moneys have been expended to market a particular 900 number, a

switch occurs. In other words, in the post-contract setting, MRO must maintain the billing services (the tied product) in order to keep the particular 900 number (the tying product).

DISCUSSION

"The district court may grant a motion for judgment on the pleadings when the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law." Yanez v. United States, 63 F.3d 870, 872 (9th Cir. 1995). All allegations of fact by the party opposing the motion are accepted as true and are construed in the light most favorable to that party. General Conference Corp. of Seventh-Day Adventists v. Seventh Day Adventist Congregational Church, 887 F.2d 228, 230 (9th Cir. 1989), cert. denied, 493 U.S. 1079 (1990).

I. Section One - An Illegal Tying Arrangement

a. The billing services as the tying product:

Section One of the Sherman Anti-Trust Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C, § 1. A vertical non-price restraint, such as the one at issue in the instant case, is governed by the rule of reason, which requires an examination of whether the restraint had an anti-competitive effect on the relevant market. Continental T.V. Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 58-59 (1977).

Plaintiff argues that Defendant has engaged in an illegal tying arrangement linking its transport services to its billing services. A tying arrangement is an agreement by one party to sell a product (the tying product) to a buyer, but only on the condition that the buyer also purchase from the seller a different product (the tied product). Eastman Kodak Co. v. Image Technical Servs. Inc., 504 U.S. 451, 461 (1992).

The Ninth Circuit has held that there are three elements necessary to establish a per se tying arrangement:

> (1) a tie-in between two distinct products or services; (2) sufficient economic power in the tying product market to impose significant restrictions in the tied product market; and (3) an effect on a non-insubstantial volume of commerce in the tied product market.

Mozart Company v. Mercedes-Benz of North America, Inc., 833 F.2d 1342, 1344 (9th Cir. 1987), cert. denied, 488 U.S. 870 (1988)..

There is no question in the Court's view that there are two distinct products at issue here; the transport services and the billing services. There is, however, some question as to whether these two products are "tied." It is clear that Plaintiff was able to purchase the transport services without purchasing the billing services. It appears, however, that Plaintiff could not have obtained billing services from AT&T without purchasing the transport services. Viewing this evidence in the light most favorable to the nonmoving party for the purposes of this motion, the Court concludes that there is a "tie-in" between the two products.

The inquiry, however, does not end. The next element which needs be shown is "sufficient economic power in the tying product market to impose significant restrictions in the tied product market." Mozart at 344. The "essential characteristic" of a tying arrangement violative of § 1 "lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12 (1984). There can be no Sherman Act violation in the absence of the seller's ability to "force" the buyer to act in a manner different from the way he would behave in a competitive market. Id. at 13-14. This ability is termed "market power" in the tying market -- the ability of the seller to raise price and restrict output. Kodak, at 464.

Plaintiff contends that Defendant has approximately 50% market share in the billing services market. That alone, however, is not an indication that AT&T has sufficient market power to impose the restrictive terms at issue here prior to entering the Billing Services Agreement (BSA). To the contrary, there is indication from the pleadings on file that both Sprint and MCI had submitted acceptable bids to MRO. Such a statement made by Plaintiff is indicative of competition in the billing services market. With such competition, it is doubtful that Defendant was able to "force" Plaintiff to accept the restrictive terms or buy its products. Apparently, the exact or similar products were available at similar prices from other sources. It appears that Plaintiff chose Defendant as its billing services provider and as its transport services provider due to Defendant's low combined rate of uncollectables and chargebacks. MRO, in determining which bid to accept, had

to weigh AT&T's representations of its chargeback rates against the restrictive terms included in the BSA. As indicated in Plaintiff's Amended Complaint, it rejected the offers from MCI and Sprint to provide the exact services provided by AT&T to Plaintiff. It is clear to the Court that AT&T did not have the requisite market power in the tying product to force a buyer into purchasing the tied product which it would have preferred to purchase elsewhere.

b. The individual "900 numbers" as the tying product:

Plaintiff also contends that once the BSA is entered into, in order to keep the particular 900 numbers, of which much effort and resources have been expended in marketing, they were forced to keep the billing services. It would like the Court to find that the relevant market in such an instance is the users of the particular 900 numbers at issue. In such a case, it argues, AT&T controls 100% of the relevant market. MRO presents no judicial authority indicating that the relevant market changes after entering into a contract. Similar arguments have been made and rejected in franchising cases.

In Mozart Co. v. Mercedes-Benz of North America, supra, the Ninth Circuit rejected a post-contractual definition of the relevant market. The issue in that case focused on contractual terms which required Dealers to use only approved parts for servicing the Mercedes automobile. Plaintiff argued that it was locked-in to this purchase because of the financial resources which had been expended in promoting the Mercedes-Benz and its franchise. The court, however, explicitly rejected that argument indicating that these costs are costs unrelated to "market power" but are

related to the franchise method of doing business. Id., 833 F.2d at 1346-47.

In Queen's City Pizza, Inc. v. Domino's Pizza, Inc., No. 95-CV-3777, 1996 WL 220985 (E.D. Pa.), the court concluded that the requirement that products to be used in Domino's Pizza Franchises be purchased from a particular supplier was not an illegal tying arrangement, even though Plaintiff argued that Dominos controlled 100% of the relevant market (Domino's Franchises). The court determined that the relevant market is defined prior to the entering of the franchise agreement, where competition is keen. As support for its conclusion, the court cited two influential commentators:

> The important economic distinction that must be made is between pre- and post-contract economic power. Precontract, competition among franchisors (such as McDonald's or Kentucky Fried Chicken) to sign up franchisees prevents [a single franchisor] from exercising any economic power in setting contract terms with potential franchisees. [The franchisor] . . . does not possess any economic power in the market in which it operates -- the fast food franchising (or perhaps, more generally, the franchising) market.
> Postcontract, on the other hand, a franchisor can use the threat of termination to "hold up" a franchise that has made a specific investment in the marketing arrangement. However, this potential economic power has nothing to do

> with market power, ultimate consumers' welfare, or antitrust.

Id. at *5, citing Benjamin Klein & Lester F. Saft, The Law and Economics of Franchise Tying Contracts, 28 J.Law & Econ. 345, 356 (1985).

In Ajir v. Exxon Corporation, No. C 93-20830 RMW (PVT), 1995 WL 429234 (N.D.Cal.), the court noted plaintiff's argument that after a franchise agreement is executed, they are "locked in" to dealing solely in Exxon gasoline. The relevant market should therefore be Exxon gasoline. The court rejected this argument stating, "Plaintiffs have cited, and the court can find, no case upholding a definition of the relevant market as the market for the manufacturer's own product." Id. at *3.

The Fourth Circuit has noted that "[i]t has generally been recognized that every manufacturer has a 'natural monopoly' in the sale and distribution of its own products." Stearns v. Genrad, Inc., 752 F.2d 942, 946 (4th Cir. 1984). The Fifth Circuit has held that a particular brand of television sets is not a relevant market, but the market includes all televisions. Muenster Butane, Inc. v. Stewart Co., 651 F2d 292, 295 (5th Cir. 1981).

This Court cannot conclude, as a matter of law, that the relevant market is the particular "900 numbers" issued by AT&T under its BSA. The Court has already noted in prior orders that there is justification for AT&T to issue different numbers upon the cancellation of a BSA; i.e., numbers which are subject to billing services have a different prefix than those that do not. This eases bookkeeping requirements

which conceivably could result in lower prices to consumers. This Court holds that the post-contractual arrangement, the specific "900 numbers" is not the relevant market, but the relevant market would include all 900 numbers available. There has been no allegation, nor is it likely to be shown, that AT&T enjoys sufficient market power over all "900 numbers" available to allow it to force Plaintiff into purchasing or maintaining a service that it otherwise would not want.

II. Section Two - Monopolization or Attempted Monopolization

Plaintiffs further contend that AT&T is liable under § 2 of the Sherman Anti-Trust Act for its monopolization or attempted monopolization of the relevant market. Section 2 sanctions those "who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 2.

In order to sustain a claim of monopolization, Plaintiff must show that Defendant (1) possessed monopoly power in the relevant product and geographic markets; and (2) acquired and maintained that power wilfully, as distinguished from having developed its business as a result of superior product, business acumen, or historic accident. United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

As for attempted monopolization, Plaintiff must show (1) that Defendant has engaged in predatory or anti-competitive conduct with (2) a specific intent to monopolize

and (3) a dangerous probability of achieving monopoly power, an inquiry requiring an examination of the relevant market and the Defendant's ability to affect competition in that market. Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993).

The Court has previously discussed the keen competition which is apparent in this market, both for billing services and for transport services. Plaintiff has presented no evidence indicating that Defendant has a monopoly or is dangerously close to acquiring one in either market. . . . Nor has Plaintiff presented any evidence which would indicate Defendant's wilful conduct in maintaining or acquiring a monopoly in the billing services industry or in the transport services market.

RECOMMENDATION

It is the recommendation of the United States Magistrate Judge for the District of Nevada that Defendant's Motion for Judgment on the Pleadings Dismissing Plaintiff's Antitrust Claim (#183) be **granted.**

Dated this 17th day of June 1996.

/s/_____
ROGER L. HUNT
UNITED STATES MAGISTRATE JUDGE

NOTICE

Pursuant to Local Rule 510-2, any objection to this Report and Recommendation must be in writing and filed with the Clerk of the Court within ten (10) days after receipt of this Notice.

APPENDIX D

[Filed January 25, 2000]

No. 98-16716
D.C. No. CV-95-00503-PMP

MRO COMMUNICATIONS, INC., *Plaintiff-Appellant,*	)
v.	)
AMERICAN TELEPHONE & TELEGRAPH COMPANY, now AT&T Corp., *Defendant-Appellee.*	)

ORDER

Before: CHOY, SCHROEDER, and ALARCÓN, Circuit Judges.

The panel has voted to deny plaintiff-appellant's petition for rehearing. Judge Schroeder has voted to deny the petition for rehearing en banc. Judge Choy and Judge Alarcón recommend that the petition for rehearing en banc be denied.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are denied.

APPENDIX E

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

[Filed May 31, 1995]

No. BK-S 92-25253-LBR
ADV. NO. 932096

In re:	)	
	)	
MRO COMMUNICATIONS, INC., a Nevada Corporation, *Debtor*	)	
	)	[CHAPTER 11]
	)	
MRO COMMUNICATIONS, INC., a Nevada Corporation, *Plaintiff*,	)	
	)	
v.	)	
	)	
AMERICAN TELEPHONE & TELEGRAPH, *Defendant*.	)	

FIRST AMENDED AND SUPPLEMENTAL COMPLAINT FOR BREACH OF CONTRACT, TORTIOUS BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING, NEGLIGENT MISREPRESENTATION, INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE, VIOLATION OF ANTITRUST LAWS, VIOLATION OF FEDERAL COMMUNICATIONS ACT, TURNOVER, ACCOUNTING, BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING, VIOLATION OF THE AUTOMATIC STAY, AND PROMISSORY ESTOPPEL.

Plaintiff MRO Communications, Inc., a Nevada corporation ("MRO") avers as follows:

JURISDICTION/VENUE

1. This is a adversary proceeding arising in the above captioned bankruptcy case against American Telephone & Telegraph ("AT&T").

2. This Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. Section 1334.

3. Plaintiff believes and alleges that the claims for relief are "core" proceedings subject to determination by this Court pursuant to 28 U.S.C. Section 157(b) (2) (A), (E). In the event any claim for relief is not a "core" proceeding, Plaintiff consents to the resolution of these claims by this Court.

4. Plaintiff is informed and believes that Defendant AT&T (a New Jersey Corporation, with its principal place of business in New Jersey) is found in, and transacts business in, the District of Nevada.

5. Performance of the agreements between AT&T and Plaintiff that are the subject of this action has occurred, and continues to occur, in the District of Nevada.

6. In addition to the jurisdictional basis set forth above, this action is brought for the purpose of obtaining a declaratory judgment pursuant to 28 U.S.C. Sections 2201 and 2202 and Federal Rule of Civil Procedure 57. This is a case of actual controversy in which the Plaintiff seeks a declaration of rights and other legal relationships between itself and the Defendant pursuant to the contracts between Plaintiff and Defendant AT&T and pursuant to the Federal Communications Act and/or the Federal Antitrust Laws. Pursuant thereto, Plaintiff seeks to adjust the debtor/creditor relationship under 28 U.S.C. Section 157(b)(2) (0), by obtaining a declaratory judgment that certain proposed actions of the Defendant, including the termination of Plaintiff's 900 numbers, the termination of billing and collection services, and the termination of tariffed transport services on Plaintiff's existing 900 numbers proposed to be taken by Defendant AT&T pursuant to MRO's agreements with AT&T are illegal, would constitute material breaches of said agreements, and/or violations of the Federal Communications Act, and/or the Federal Antitrust Laws.

7. Jurisdiction is also founded on 15. U.S.C. Sections 4, 15 and 47 U.S.C. Sections 206, 207, with pendant jurisdiction of the state law claims.

8. Venue is proper under 28 U.S.C. Sections 1391(c) and 1409.

THE PARTIES AND THEIR BUSINESSES

9. MRO Communications, Inc., a Nevada corporation ("MRO"), is a corporation duly authorized under the laws of the State of Nevada. MRO is currently a debtor and Debtor-In-Possession in Chapter 11 bankruptcy Case No. BK-S 92-25253-LBR filed on November 25, 1992 and currently pending before the United States Bankruptcy Court, District of Nevada.

10. MRO acts as a service bureau, offering to telephone information service providers ("IP's") both AT&T "900 tariffed transport services" and the associated AT&T billing and collection services that are the keystone of the IPs' 900 pay-per-call businesses. MRO also acts as an IP itself. The term "900 tariffed transport services" refers to AT&T's basic utility or telecommunications services which provides for AT&T's transmission of the 900 telephone call from the caller's telephone to MRO's facility in Las Vegas, Nevada. Pursuant to AT&T's associated 900 billing and collection services the calling party is charged for each call made to each of MRO's 900 telephone numbers at a rate selected by MRO, which is different from the rate the caller would be charged for making an ordinary long-distance call This additional charge is for the access to the information provided by MRO, or other IP. Examples of such pay-per-call services include sports scores, computer dating "bulletin boards", stock market quotes, weather data, etc.

11. MRO is informed and believes, and on that basis alleges, that AT&T was at all relevant times herein a corporation authorized to do business and was conducting business in the State of Nevada.

12. AT&T is principally engaged in the business of providing interstate and intrastate common carrier communications services throughout the United States and the world. In conjunction with its menu of such offerings, AT&T offers 900 tariffed transport services and 900 billing and collection services. AT&T's 900 billing and collection services involve the transmission of a billing statement to the caller, generally through a local telephone company, and the assumption of the responsibility for receiving and responding to billing error complaints or inquiries. It also involves the collection of the monies due from the callers of the 900 telephone numbers. Thus, AT&T not only makes available the telephone transmission services (i.e., the tariffed transport services, also known as the utility or telecommunication services) for the 900 telephone numbers, but AT&T also provides the linked billing and collection services for such 900 telephone numbers to its customers, including service bureaus and IP's, such as MRO. Additionally, AT&T's provision of interstate common carrier tariffed transport services for 900 telephone numbers is regulated by the Federal Communications Act and the tariffs filed thereunder.

AT&T'S MISREPRESENTATIONS AS TO THE RATE OF UNCOLLECTIBLES AND CHARGEBACKS.

13. In or about 1989, AT&T approached MRO and represented to MRO that it had the ability to provide 900

telephone number billing and collection services for entities which desired to operate as a service bureau and/or information provider. During these same conversations, AT&T represented to MRO that AT&T's combined rate of "uncollectibles" and "chargebacks" was lower than that of other carriers that were competing with AT&T for MRO's 900 billing and collection services, such as MCI and Sprint Communications. "Uncollectibles" are charges for calls that are treated as uncollectible bad debts by AT&T without the caller ever disputing the charge or affirmatively refusing to pay. "Chargebacks" are those charges that the caller affirmatively disputes or refuses to pay, and AT&T charges them back to its customers, such as MRO.

14. In or about 1989 before MRO executed the MRO BSA, AT&T represented to MRO that AT&T's combined rate of uncollectibles and chargebacks for all of AT&T's 900 telephone calls had been no greater than ten percent (10%) of all AT&T 900 telephone calls (the chargeback rates varied by type of information service provided). AT&T represented that these rates would continue, and AT&T also represented that MRO's combined rate of uncollectibles and chargebacks for all of its programs (consisting primarily of sports scores and "picks", dating bulletin boards, and romance fantasies) would also not exceed ten (10%) percent. These representations were made for the purpose of inducing MRO to enter into the MRO BSA.

15. For several months after MRO executed the MRO BSA, AT&T represented to MRO that MRO's combined rate of uncollectibles and chargebacks was approximately five percent (5%), when in fact it was significantly higher. At the time AT&T made such

representation to MRO they knew, or should have known that it was false. MRO relied upon such false representation to MRO's detriment by purchasing hundreds of thousands of dollars of telephone computer equipment, by incurring significant other business expenses, and by adding more AT&T 900 telephone numbers.

16. AT&T further agreed to render an accounting, and tender final payment, for a given calling period within ninety (90) days after the end of such period. AT&T knew that it was important to MRO, as well as other service bureau clients like MRO, for settlements to be completed expeditiously so that billing and collection customers can manage and anticipate their cash flows.

17. MRO is informed and believes, and on that basis alleges, that AT&T was aware that MCI and Sprint Communications had made MRO offers to provide similar 900-number billing and collection services that were sufficiently definite to be capable of acceptance.

18. Among the reasons MRO entered into the MRO BSA with AT&T, and rejected the offers of MCI and Sprint, was MRO's reliance upon AT&T's representations that AT&T 900-number service would provide a lower rate of chargebacks and uncollectibles and would provide more accurate, effective and efficient billing and collection services than would MCI and Sprint Communications.

AT&T'S BILLING AND COLLECTION SERVICES AND TARIFFED TRANSPORT SERVICES FOR 900 NUMBERS WERE INEXTRICABLY TIED TOGETHER BY AT&T.

19. AT&T's billing and collection services are offered by AT&T only through a "Billing Services Agreement" ("BSA"), such as Contract No. 111448 QJ executed by MRO in May, 1989 ("MRO BSA"). As MRO added additional 900 telephone numbers to the MRO BSA, MRO believes that MRO would typically do so by means of a "Billing Services Agreement Additional Page".

20. Pursuant to a FCC decision, AT&T's provision of billing and collection services for 900 telephone numbers is not now directly regulated by the Federal Communications Commission, even though it is a service "for or in connection with" common carrier "like communication services" under Sections 201, 202, et. seq. of the Federal Communications Act. Because AT&T's 900 billing and collection services are "for or in connection with" common carrier "like communication services" pursuant to such Sections, they are subject to the Federal Communications Act.

21. AT&T's billing and collection services are also "for or in connection with" AT&T's tariffed transport services (i.e., "like communications services") because AT&T's billing and collection services for each and every particular MRO 900 telephone number are tied to AT&T's tariffed transport services for each such 900 telephone number (i.e., once AT&T ceases billing and collection services for a particular 900 telephone number, AT&T refuses to thereafter

provide tariffed transport services for that 900 telephone number).

22. The relevant provisions in the MRO BSA are:

> "8.G. The Premium Billing Arrangement for MultiQuest Dial-It 900 Service provided for in this agreement will automatically terminate if Network Services are not subscribed to for a period of ninety (90) days."
> 9. . . . upon termination of this Agreement AT&T will assign you a different telephone number(s) if you elect to continue Network Services." [i.e., tariffed transport services].

23. Even though Section 9 of MRO's BSA is expressly applicable only "upon termination of this Agreement", AT&T applied it whenever any particular 900 program under the MRO BSA was terminated, even though the MRO BSA itself was not terminated as required by the BSA. Thus upon AT&T's termination of <u>any program</u> under the MRO BSA, AT&T refused to permit MRO to keep the same 900 telephone number(s) in order for MRO to continue to receive tariffed transport services on such 900 telephone number(s). AT&T refused to continue to provide tariffed transport services for MRO after AT&T's billing services for a particular MRO 900 telephone number was terminated, unless AT&T assigned a new 900 telephone number. Since the callers of such 900 telephone numbers were used to calling the existing MRO 900 telephone numbers, this AT&T practice destroyed the value of MRO's and the IP's interests in such 900 telephone numbers.

24. As a result of these provisions (and virtually identical provisions in all of AT&T's other BSA's with other customers) all of AT&T's 900 MultiQuest BSA customers must use AT&T's tariffed transport services (i.e., "Utility" or "Network Services"); then if the BSA is terminated by either party, for any reason whatsoever, AT&T's 900 customer loses its unique 900 numbers. The practical effects on information providers are very severe. After operations commence, the AT&T 900 information provider like MRO, cannot elect to use another billing service without losing its 900 telephone numbers, in which it has invested significant monies in promotion, and which are typically the only practical way for the 900 information provider's customers to do business with the information provider, or to even be able to contact the information provider.

25. Thus, under paragraph 8.G. of the MRO BSA, the 900 information provider must use AT&T's Network [tariffed transport or utility] services. If an information provider, like MR0, uses AT&T's tariffed 900 transport services, the information provider must continue to use AT&T billing services or lose its unique 900 numbers; in which the customer, such as MRO, typically will have invested substantial sums. The effects of these provisions in the MRO BSA are to "tie" AT&T's tariffed 900 transport services to its 900 billing services for the information provider's life, and to prevent AT&T customers (like MRO) from utilizing billing services of AT&T's competitors.

AT&T IS AN ESSENTIAL FACILITY TO ITS 900 TELEPHONE NUMBER CUSTOMERS.

26. As set forth above, in 1989 and continuing thereafter AT&T tied its provision of billing and collection services for 900 telephone numbers to AT&T' s provision of tariffed transport services on those same 900 telephone numbers, even though the provision of such different services was governed by different contracts; and even though the provision of tariffed transport services was governed by tariff. Thus, AT&T claimed and exercised its alleged "right" to terminate billing services for certain 900 telephone numbers so as to also terminate its customers', including MRO's (and MRO's customer's) rights, to continue to use the same 900 telephone numbers for which AT&T had agreed to provide tariffed transport services. AT&T terminated the use of the same 900 telephone numbers in such situations even though (i) MRO and other customers had spent substantial, sums of money in advertising such 900 numbers, (ii) such 900 numbers were frequently the only practical way for the customers of such numbers to do business with MRO (and/or MRO's customers) or to even contact MRO, and (iii) such termination was of no useful benefit to AT&T other than to exact a penalty from the users of such 900 numbers, such as MRO, MRO's customers, and the callers of such 900 numbers.

27. Even though other companies such as MCI and Sprint from 1989 also provided tariffed transport services for 900 numbers there was no competition for such services for any particula 900 telephone number because AT&T and other carriers did not permit the portability of 900 telephone

numbers from one carrier to another. Had 900 numbers been portable (or had AT&T not inextricably linked its provision of billing services for particular 900 telephone numbers to AT&T's provision of tariffed transport services for such 900 telephone numbers), the cost of 900 tariffed transport services (or of 900 billing Services) would have been reduced by at least 10% to MRO.

28. From 1989 until present, MRO and its customers have used particular 900 numbers continuously, and not just for one application.

29. On information and belief, since 1989, AT&T's share of both the national tariffed transport services market and the national billing and collection services market for national 900 telephone numbers has approximated fifty percent (50%) of such markets. Such markets now total an estimated $1.0 billion dollars annually. MRO's revenue from 900 telephone numbers and from servicing 900 numbers exceeded one million dollars per month before AT&T commenced illegally terminating billing and collection services and tariffed transport services on MRO's 900 telephone numbers, as well as the 900 telephone numbers themselves.

30. Nothing in AT&T's 900 tariff permits AT&T to terminate tariffed transport services for particular 900 numbers because of AT&T's customers' alleged or actual violations of the BSA, or AT&T advertising or other AT&T Guidelines.

31. Because of AT&T'S practices of tying 900 tariffed transport services to 900 billing services, and

terminating customers' use of 900 numbers whenever a billing services agreement is terminated (or even when billing services for a program under a BSA is terminated), and because 900 numbers are not portable to another common carrier, AT&T is an essential facility to its 900 telephone number customers.

AT&T'S TERMINATION OF 900 SERVICES BREACHED THE MRO BSA AND/OR VIOLATED THE FEDERAL COMMUNICATIONS ACT.

32. Commencing in 1991 AT&T on many occasions terminated billing and collection services (as well as AT&T's linked tariffed transport services) on numerous MRO 900 telephone numbers on the alleged grounds that (i) "the advertising for these lines contained implicit and explicit sexual references", and/or (ii) AT&T's Guidelines were allegedly violated. Such terminations breached the MRO BSA and/or violated the Federal Communications Act for the following reasons:

> First, frequently the allegedly objectionable advertising did not even refer to AT&T's 900 numbers; instead it referred to other telephone numbers, which were not AT&T 900 programs.
>
> Second, frequently the allegedly objectionable advertising was neither "sexually explicit or implicit".

Third, frequently AT&T's termination letters to MRO would refer to Section 7.A. (2) of the BSA between AT&T and MRO Communications. However, there is no such section in the MRO BSA.

Fourth, frequently AT&T's termination letters to MRO referred to AT&T's Guidelines as justification for AT&T's refusal to provide billing and collections services (and tariffed transport services on MRO's 900 telephone numbers) because of advertising allegedly containing "implicit or explicit sexual references". In fact, what AT&T's Guidelines prohibited were ". . . explicit or implicit descriptions of violence or sexual conduct . . ." (Emphasis added.)

Fifth, AT&T's Guidelines were not part of the MRO BSA because they were not signed by MRO as required by paragraph 12.A.

Sixth, AT&T specifically and frequently approved advertising for AT&T 900 numbers that was sexually implicit or explicit. For example, AT&T approved advertising that was explicitly directed to, and used the word, "swingers". The word "swingers" refers to people who are seeking sexual liaisons. AT&T also approved advertising for AT&T 900 numbers, which included phrases such as "Share Women's most secret desires! Totally

Uninhibited Fantasies & Confessions." AT&T also specifically approved advertising for AT&T 900 numbers, which included phrases such as "Contact Swingers . . . Single Girls and Couples - Lifestyles - Mild to Wild!"

Seventh, there was no provision in the MRO BSA, or in the tariff, which permitted AT&T's termination of tariffed transport services on MRO's 900 telephone numbers just because AT&T terminated billing services on one or more of MRO's 900 programs; regardless of the reason for AT&T's termination of such billing services.

Eighth, frequently AT&T discriminated against certain services bureaus and/or information providers by (i) cancelling AT&T scheduled terminations (for alleged violation of AT&T Guidelines and/or other reasons) of 900 telephone number billing, collection, and transport services for certain favored service bureaus and/or information providers, and by (ii) reactivating billing, collection and transport services for 900 telephone numbers that had been terminated by AT&T (for alleged violations of AT&T Guidelines and/or other reasons) for certain favored service bureaus and/or information providers; all in violation of the Federal Communications Act. In addition, AT&T also discriminated against certain service bureaus and/or information providers by permitting certain favored service

bureaus and/or information providers to continue to receive tariffed transport services on the same 900 telephone number that AT&T had terminated billing and collection services on for alleged violations of AT&T's Guidelines and/or other reasons.

33. AT&T's termination of billing and collection services (as well as AT&T's linked 900 tariffed transport services for such 900 telephone numbers) for MRO's 900 numbers violated the MRO BSA including, but not limited to, paragraphs 8.A., 8.B., 9., and 12.A. (and the terms and conditions implied pursuant to those Sections), violated the notice provision of the March 8, 1991 Addendum to the MRO BSA, violated the Federal Communications Act and the tariffs filed thereunder, and in some cases even violated Guidelines AT&T had published for the use of 900 numbers.

* * *

EIGHTEENTH CLAIM FOR RELIEF

(Antitrust Laws 15 U.S.C. Secs. 1, 2)

145. MRO realleges and reincorporates paragraphs 1 through 144 herein as though set forth in full.

146. The acts of AT&T herein set forth constitute unreasonable restraints of trade in violation of Section 1 of the Sherman Act, 15 U.S.C Section 1, and monopolization and attempts to monopolize in violation of Section 2 of the Sherman Act, 15 U.S.C. Section 2.

147. MRO sustained damages as a result of AT&T's violation of the Sherman Act for excess tariff (and/or billing and collection) charges, and for lost revenue; in an amount not yet ascertained. MRO will seek leave of this Court to amend this Complaint when the amount of such damages has been determined.

* * *

DATED: February 6, 1995

Respectfully submitted,

GREENBERG & BASS
A Partnership Including
Professional Corporations

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